Bardaville Electric Co., Inc. *and* Local 498, International Brotherhood of Electrical Workers, AFL–CIO. Case 7–CA–32667

December 15, 1994

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On October 26, 1992, the National Labor Relations Board issued a Decision and Order[1] in which it ordered the Respondent to make whole discriminatee David Fashbaugh for any loss of earnings, with interest, that he may have suffered as a result of the Respondent's unlawful conduct. On August 8, 1993, the Respondent executed a stipulation waiving its rights under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying that Order.

A controversy has arisen over the amount of backpay due under the Board's Order. On September 22, 1993, the Regional Director for Region 7 issued a compliance specification and notice of hearing alleging the amount of backpay due and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. On October 22, 1993, the Regional Attorney for Region 7 wrote the Respondent advising that it had not filed a timely answer to the compliance specification. The Respondent was further advised that unless it filed an answer by November 5, 1993, a Motion for Summary Judgment would be filed with the Board. Thereafter, the Respondent was granted an extension of time until November 23, 1993, to file an answer. On January 20, 1994, the Acting Regional Attorney for Region 7 wrote the Respondent again advising that it had not filed an answer and that unless an answer was filed by February 3, 1994, a Motion for Summary Judgment would be filed with the Board.

On January 19, 1994, the Respondent, acting pro se, filed a letter and an answer. By letter dated January 28, 1994, the Respondent, pro se, filed an amended answer. By letter dated January 31, 1994, the Regional Director for Region 7 advised the Respondent that its initial answer did not comply with the requirements of Section 102.56(b) of the Board's Rules and Regulations. The requirements of Section 102.56 were explained in the Region's letter, a copy was enclosed, and the Respondent was advised that unless an appropriate amended answer was filed by February 3, 1994, a Motion for Summary Judgment would be filed.

Also on January 31, 1994, counsel for the General Counsel further advised the Respondent, both telephonically and by letter sent by facsimile transmission and regular mail, that its answer and its amended answer did not satisfy the requirements of Section 102.56 of the Board's Rules and Regulations, which were again enclosed.[2] Thereafter on February 11, 1994, counsel for the General Counsel orally advised the Respondent of the need to file a second amended answer.

On March 7, 1994, the General Counsel filed with the Board a Motion for Summary Judgment, with attached exhibits.[3] The General Counsel requests that all the allegations of the backpay specification be deemed admitted to be true, that the Respondent be precluded from adducing evidence controverting these allegations, and that the Board issue a decision and appropriate remedial Order.

On March 10, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On March 24, 1994, the Respondent timely filed a pro se response to the Board's Notice to Show Cause. This response consists of a letter dated February 25, 1994, that is styled an amended answer.[4] Attached to the Respondent's response and amended answer are copies of the Board agent's January 31, 1994 letter to the Respondent; copies of the Respondent's January 19 and January 28, 1994 answers, and a letter from the Respondent to the Board agent dated January 19, 1994, which specifically places in issue the gross backpay calculation for the month of November 1991, and the method of calculating backpay.

The Respondent's February 25, 1994 response and amended answer requests that the Board disregard the previous answers filed because the Region advised the Respondent that the Board's Rules required more specificity. The Respondent also submits that it is acting pro se; that an officer of the Board incorrectly informed the Respondent about the ''proper procedure'' for answering the specification; that the Respondent has submitted its answer three times to date; and that due to incorrect information given by the Board, the Respondent was unable to meet the Board's time requirements for answering the specification.

[1] 309 NLRB 337.

[2] In this letter, counsel for the General Counsel ''apologize[d] for the past confusion regarding the Answer to the Backpay Specification.'' We note in this regard that the Respondent in its January 19 and 28, 1994 answers stated that after corresponding with the Region's supervisory compliance officer, the Respondent ''was lead to believe that [it] would be unable to disprove the Board's backpay amount.'' The letters further stated that the Respondent was thereafter advised of its ''right to argue . . . incorrect calculations.''

[3] These exhibits include an affidavit dated March 4, 1994, from the Regional Director for Region 7. He avers that no appropriate answer has been filed and the failure to do so has not been explained.

[4] This letter is addressed to the Board's Regional Office, but bears the same zip code as all parties to this matter except the Board. We note that the Respondent's February 25 letter would have been timely in light of the Region's February 11 reminder that the Respondent needed to file a second amended answer.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states:

> (b) Contents of answer to specification.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

In its original January 19, 1994 answer to the compliance specification, the Respondent answered either ''Deny,'' ''Incorrect,'' ''Neither admit or deny,'' or Disagree'' to the allegations of the specification. In its January 28, 1994 first amended answer, the Respondent pled either ''Deny,'' or ''Neither admit or deny'' to the allegations of the specification. We find that the Respondent's answer and first amended answer are deficient to the extent they contain general denials concerning those matters within the Respondent's knowledge.[5]

We respectfully disagree with our dissenting colleague's position that the Respondent has failed to raise a litigable issue of material fact concerning the appropriateness of the backpay period. In order to remedy the Respondent's unfair labor practice, we must restore the status that would have obtained if Respondent had committed no unfair labor practice. There is some evidence that discriminatee Fashbaugh would have terminated his employment with Respondent even if there had been no unfair labor practice. Fashbaugh allegedly told a coemployee, prior to the unfair labor practice, of his plans to do precisely that. If that was Fashbaugh's plan, backpay would toll as of the date of his planned departure.[6] Accordingly, we would hold a hearing on this issue.[7]

In this case, however, the Respondent has filed a more specific pro se response to the Notice to Show Cause that is styled an amended answer. The Board has held that, even in the absence of an amended backpay specification, a respondent may amend its answer prior to hearing in the matter. *Toledo 5 Auto/Track Plaza*, 306 NLRB 842, 843 (1992). We treat the Respondent's response to the Notice to Show Cause as a proper and timely second amended answer. *Vibra-Screw, Inc.*, 308 NLRB 151, 152 (1992).[8]

Having construed the Respondent's response to the Notice to Show Cause as a second amended answer, we find that it raises litigable issues of fact concerning gross backpay calculations, the appropriate backpay period, and, interim earnings, which are best resolved by a hearing. In its second amended answer and response to the Notice to Show Cause, the Respondent sets forth an alternative date and basis for determining the backpay period and alternative figures for calculating gross backpay.[9] Accordingly, we deny the General

[5] The Respondent's original answers were valid insofar as they pertain to interim earnings.

[6] By contrast, where a discriminatee obtains other employment *after* the discharge, it is not clear that he/she would have left the original employer in the absence of the discharge. Indeed, it is likely that the employee would have stayed with the original employer, absent the discharge. Thus, the backpay period continues to run even after the other employment is obtained.

[7] We do not find it dispositive that Fashbaugh told an *employee* rather than Respondent, of his intention to leave Respondent's employ. This factor may be germane to the clarity and finality of Fashbaugh's plans, but it is not necessarily dispositive of the issue. Thus, we would hold a hearing on the issue.

[8] As noted, this case, like *Vibra-Screw*, involves an effort to amend a partially valid answer that was filed prior to hearing.

[9] The Respondent claims that the gross quarterly backpay computation for the fourth quarter of 1991 is incorrect because it includes all wages earned or that would have been earned by discriminatee David Fashbaugh during November 1991, even though his discharge did not occur until November 11, 1991. In addition,

Counsel's Motion for Summary Judgment and order a hearing on issues raised by the Respondent's response to the Board's Notice to Show Cause which we construe as a proper and timely second amended answer to the compliance specification.[10]

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 7 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence concerning the issues raised in the compliance specification. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the relevant evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER BROWNING, dissenting in part.

I am in substantial agreement with my colleagues, but I would grant summary judgment on paragraphs 1 and 2 of the backpay specification.

In the underlying unfair labor practice proceeding,[1] the discriminatee in this case, David Fashbaugh, testified that on November 9, 1991,[2] 2 days before his discriminatory discharge, he told fellow employee Mike Michaels that he (Fashbaugh) had a ''job lined up at Alpine Electric,'' but that he did not have a definite starting date and that he was quite undecided about whether to try to organize the Respondent's employees.

Fashbaugh also testified that on November 11, just prior to being discharged, he told Michaels that he was not going to try to organize the Respondent's employees, but ''was just going to quit and go to work for Alpine when they called.'' In fact, however, Fashbaugh did not quit, because immediately thereafter, he was called into the office of the Respondent's president. There, in the words of the administrative law judge, as affirmed by the Board, Fashbaugh was ''summarily fired . . . because the Employer had become aware of his activities on behalf of the Union.''

Paragraph 1 of the backpay specification alleges:

> The amount of backpay due to David Fashbaugh is the amount of backpay he would have received, but for the discrimination against him.

The Respondent denies the allegation, asserting:

> It became necessary, financial[ly], for my company to lay off Mr. Fashbaugh and during the hearing, Mr. Fashbaugh admitted to finding employment with another company and was working for that company within days of his layoff. Mr. Fashbaugh was not guaranteed earning the amount of backpay specified.

Paragraph 2 of the backpay specification alleges:

> The backpay period for David Fashbaugh is from November 11, 1991, when he was discriminatorily discharged, until December 31, 1992, when he would have been laid off.

The Respondent denies this allegation, asserting:

> If Mr. Fashbaugh is due any backpay, it should be from the date that he was laid off until the date of hire to the company that he had sought employment with prior to his layoff.

The Respondent appears to make two related arguments in support of an alternative backpay period. First, the Respondent contends that the backpay period should end approximately 1 week after the discharge when Fashbaugh began working for another employer. Second, the Respondent argues that Fashbaugh's testimony in the underlying unfair labor practice proceeding establishes that, prior to his discharge, he was planning to leave the Respondent's employ.

My colleagues find that the Respondent's above assertions state with requisite specificity an alternative backpay period and thus raise a litigable issue of fact concerning the appropriateness of the backpay period

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the Respondent contends that the gross backpay calculation based on the sum of the average monthly wage of two comparable employees for each quarter of the backpay period is incorrect because the entire month of November 1991 was used to calculate their average monthly wage. Further, the Respondent asserts that these employees were not actually comparable to discriminatee Fashbaugh because they were employed longer and were earning 25 cents per hour more than Fashbaugh. Finally, the Respondent contends that the backpay period should run only from the date of Fashbaugh's November 11, 1991 discharge until the date of his hire with another electrical contractor, which the Respondent claims was within 1 week of his discharge. In this regard, the Respondent points out that Fashbaugh admitted in his testimony in the underlying case that he had a ''job lined up at Alpine Electric'' but ''didn't have a definite starting date.'' We find that this latter claim states with requisite specificity an alternative backpay period. We do not pass on the merits of any of the Respondent's arguments.

[10] Moreover, in denying summary judgment, we note the Region's January 31, 1994 letter acknowledging that confusion existed when various Regional Office personnel communicated with the Respondent concerning its obligations to file a timely and appropriate answer. We also note, in particular, the letter dated January 19, 1994, from the Respondent to the Board agent that is attached to the Respondent's response to the Board's Notice to Show Cause. This January 19, 1994 letter (which is distinct from its answer of the same date addressed to the Regional Director) is not cited in the General Counsel's motion. As indicated, it specifically places in issue the gross backpay computation for the month of November 1991 and it places in issue the basis for computing backpay. In these circumstances, we will not penalize the Respondent's apparent good-faith efforts to resolve this controversy with the Region.

[1] 309 NLRB 337, 338 (1992).

[2] All subsequent dates are in 1991.

alleged in paragraph 2 of the specification, thus warranting a hearing on that issue. I disagree.

The Board has held that an employer's obligation to make an employee whole for losses suffered as a result of an unlawful discharge is not terminated even if the employee obtains substantially equivalent employment elsewhere; instead, the backpay obligation continues without regard to the employee's new employment.[3] In light of that precedent, the Respondent's assertion that Fashbaugh obtained other employment after being discharged by the Respondent does not raise a material issue of fact about the appropriateness of the alleged backpay *period*.[4]

The Respondent's ''he-would-have-quit-anyway'' argument fares no better. If Fashbaugh had given this Respondent notice on November 11 that he would be terminating his employment on a certain future date, and if the Respondent had subsequently discharged Fashbaugh because of his union activities, then it might well be appropriate to limit the backpay period to the period between the notice and the planned termination date, because it could be said with relative assurance that Fashbaugh would only have worked that period in any event. Those, however, are not the facts of this case.

As stated above, the findings in the underlying unfair labor practice case, which may not be relitigated in the present backpay proceeding,[5] establish that on November 11 Fashbaugh did not quit his employment or give the Respondent notice that he would be quitting his employment on a date certain. Rather, the record shows that on November 11 Fashbaugh told a fellow employee that he was ''going to quit'' his job. Whether and when Fashbaugh would have actually quit work is highly speculative. By abruptly terminating him on November 11 because of his union sympathies, the Respondent has made it impossible to determine what might have happened absent the discharge. Where, as here, there are uncertainties or ambiguities, it is a well-established remedial principle that ''the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved.'' *United Aircraft Corp.*, 204 NLRB 1068 (1973). For these reasons, I would find that the Respondent's ''quit'' argument fails to raise a material issue concerning the appropriateness of the backpay period.[6]

Accordingly, I would grant the motion for summary judgment as to backpay specification paragraphs 1 and 2, and find the allegations therein to have been established.

[3] *Daniel Construction Co.*, 276 NLRB 1093 fn. 3 (1985). Accord: *Iron Workers Local 15*, 298 NLRB 445, 467 (1990).

[4] The net backpay *amount* would, of course, be affected by such interim earnings.

[5] See *Transport Service Co.*, 314 NLRB 458 (1994).

[6] To the extent that language in *Mastro Plastics Corp.*, 136 NLRB 1342, 1349–1350 (1962), enfd. in part 354 F.2d 170 (2d Cir. 1965), is ambiguous and can be construed as supporting the Respondent's position, I would disavow such a construction.